INSTITUTE FOR JUSTICE

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Committee on Government Operations
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Thank you for giving me the opportunity to testify with regard to the issue of the use of eminent domain in the State of Michigan for private economic development and the legislative proposals currently under consideration to stop eminent domain abuse in this state.

My name is Scott Bullock, and I am a senior attorney at the Institute for Justice, a nonprofit public interest law firm in Washington D.C. that represents people whose rights are being violated by government. One of our major areas is representing individuals whose homes or businesses are being taken by eminent domain for transfer to other private parties. In addition to participating in many eminent domain cases and controversies throughout the country, I am one of the lawyers at the Institute who represents the homeowners in the Kelo v. City of New London case and I argued that case before the U.S. Supreme Court in February 2005.

"Eminent domain" is the power to force citizens to abandon their home or business. It is one of the most serious and potentially despotic powers of government. For most of our nation's history, eminent domain was used for public projects and public utilities: roads, courthouses, bridges, railroads, and electricity. In the 1950s, eminent domain began to be used for the removal of so-called "slums." Because the removal of a deleterious area was considered to be a public use, courts allowed the subsequent transfer of property to private parties for private development. Over the ensuing years, municipalities began using eminent domain in areas that did not have substantial problems, but that might be used more profitably as something else.

In the recent U.S. Supreme Court decision in Kelo, a narrow 5-4 majority of the Court decided that, under the U.S. Constitution, property could indeed be taken for another use that would generate more taxes and more jobs if the project was pursuant to a development plan. The dissent, written by Justice O'Connor, explained that now "[t]he specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory."

The scenarios that Justice O'Connor laid out in her dissenting opinion are not hypotheticals. They are happening throughout the country. While a Motel 6 has not yet been taken for a Ritz-Carlton, other lower tax producing businesses are being taken for higher tax producing ones. For example, hours after the Kelo decision, officials in

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Freeport, Texas began legal filings to seize two family-owned seafood companies to make way for a more upscale business: an $8 million private boat marina.[1] Homes are already being taken for shopping malls. On July 12, 2005, Sunset Hills, Missouri voted to allow the condemnation of 85 homes and small businesses. This is the first step in allowing the use of eminent domain against the property owners to build a planned $165 million shopping center and office complex by the private Novus Development Corporation.[2]

And right here in Michigan, in the period between 1998-2002, we documented 311 properties that were either condemned or threatened with condemnation for private benefit. These numbers and descriptions of the projects are compiled in a report written by colleague, Dana Berliner, called Public Power, Private Gain, which is available at www.castlecoalition.org. Unless the law is changed, these abuses will continue.

As you are aware, there has been an overwhelming public outcry against the closely divided Kelo decision here in Michigan and throughout the country. One would be hard pressed to think of a recent Supreme Court decision that has generated such uniform and widespread outrage across the political spectrum. Americans are virtually united in opposition to it. Right after the decision, we and the homeowners in New London were besieged with phone calls, letters, and emails of support. Messages of opposition and dismay filled newspaper letters-to-the editor pages nationwide. Online polls on national news websites show upwards of 96 percent and often higher opposed to the Supreme Court's decision. Clearly, Americans understood just how threatening the Court's decision is to ordinary home and small business owners.

Already, at least thirty-eight state legislatures, including Michigan, have introduced or will introduce legislation that would counteract the Court's determination that eminent domain can be used for economic development. Moreover, the U.S. Congress is considering several pieces of legislation that would prohibit federal funds from going to projects that abuse eminent domain. A bill that would cut off all federal economic development funds for two years to cities that abuse eminent domain just passed the U.S. House of Representatives by the overwhelming vote of 376-38.

As currently written, Michigan law provides cities with authority and opportunity to condemn property for private development. Its statutes need reform in order to prevent further abuse.

The legislation passed by the Michigan Senate was a good start in changing eminent domain practices in this state. The primary purpose of both the legislation and the joint resolution calling for a constitutional amendment is to eliminate takings for private economic development—namely, the use of eminent domain to secure more tax revenue and job growth. The legislation and resolution essentially codify the landmark Michigan

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[1] Thayer Evans, *Freeport moves to seize 3 properties*, Houston Chronicle, June 24, 2005.
[2] Cathy Lenny, *Sunset Hills gives developer green light*, St. Louis Post-Dispatch, July 13, 2005.

Supreme Court's decision in County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

The Senate is to be commended for taking this important step to ensure that takings for private economic development do not occur in Michigan. However, the House should make two important changes to the Senate legislation.

First, the House should clarify the section of the legislation that states eminent domain can be used when "[t]he property or use of the property will remain subject to public oversight and accountability after the transfer of the property and will be devoted to the use of the public, independent from the will of the entity taking it." This provision should be clarified to ensure that this provision apply to "common carriers" and other closely regulated public corporations. The way it is written now may give grounds to a creative attorney to argue that something like a redevelopment contract between, for example, a big box retail store and a local government is the "public oversight" to which this provision refers. This is not what the Court in Hathcock had in mind when it set forth the criteria of public oversight and accountability and this legislation should be modified to ensure that it is not abused in future eminent domain battles.

Second, the issue of the abuse of blight laws must be addressed by the Michigan House, since the two current Senate proposals make an explicit exception for takings for blight, but do not change Michigan's overly-broad blight laws.

It is important for this committee to understand the relationship between eminent domain and blight law. Eminent domain is the power to take private property. One way that a city may go about taking property is by declaring an area to be "blighted." Once that designation is in place, there is a legal fiction that "clearing" the blight is a public purpose of eminent domain. I say "legal fiction," because while it makes sense to talk about clearing blight in a dangerous or unsanitary area, it makes no sense for Michigan blight designations, which can involve areas that are not dangerous, unsanitary, or even in disrepair. "Economic obsolescence" as set forth in Michigan law, for example, hardly calls for immediate razing of a cozy commercial neighborhood.

Redevelopment statutes should require objective evidence of blighted conditions and public detriments, not broad terms that can be easily manipulated by a local government that can designate an area blighted and condemn simply because it would like to put something else there. We have proposed draft language that addresses this concern and have attached copies of it to my testimony today. As you will see, it permits the transfer of property to private entities but only if the blighted property poses a threat to public health and safety, such as dilapidated structures and tax-delinquent or abandoned properties. It will prevent the use of eminent domain simply to take properties sought by cities and developers under the ruse of bogus "blight" designations.

It is important to point out that even if these changes were adopted, a vast majority of eminent domain statutes and powers would remain untouched. These powers include the myriad public projects for which eminent domain has long been used. The changes we

propose to Michigan eminent domain laws are narrow and straightforward but essential to protecting home and small business owners: the removal of eminent domain purely for private economic development and the tightening of blight/redevelopment laws to ensure that those laws address problem properties, rather than being used as a vehicle to gain property for private development.

We urge the legislature not to be led astray by false or misguided reform that promises more "process" for home and small business owners. Most of the process and approvals that a government goes through to do a development project have nothing to do with whether eminent domain should be used against home and small business owners. Do not adopt mere cosmetic changes that are procedural in nature and do not address what is at stake in this controversy and what has so outraged the public: the transfer of property from one private owner to another. In a vast majority of cases, the problem is not a lack of process but the end result of that process: poorer and working-class folks losing their property so that wealthier individuals or businesses can take their place.

Furthermore, please do not sacrifice substantive change of eminent domain laws simply to reexamine the issue of "just compensation." First, it is enormously difficult to determine the level of so-called subjective value an individual places on their home or small business. For instance, Wilhelmina Dery, one of the property owners in the New London case, has lived in her family home for all of her eighty-seven years and wants to end her years there while Susette Kelo has owned her home for only eight years but worked very hard to obtain it. Both of them equally value their castles and do not want to lose them simply so that other private parties may move in. Who is the government to claim that one of them is more deserving of higher compensation than the other? Perhaps most importantly, the compensation question does not address the real problem: some people do not want to give up their homes and businesses simply so other private parties can take over their land. That is deeply offensive to fundamental American values of fair play, regardless of how much money a city can offer.

It is also very important to remember that in a vast majority of these cases, a local government does not need to choose between economic development on the one hand and respecting the rights of property owners on the other. The two are by no means mutually exclusive because in most of these projects, the government and private parties have enough land through voluntary purchase that significant development can be accomplished. A perfect example of that is the situation in the Fort Trumbull neighborhood of New London. Right now, the City and the NLDC already have twice the land available to do development than what New York City has to rebuild the World Trade Center. The property owners do not oppose new development. They simply want to hold on their homes.

I believe it is a good idea to carefully review eminent domain laws and take into consideration the views of many organizations and individuals when doing so. We offer our continuing help in doing so. But please remember that the American people have spoken very clearly on this issue. They do not want eminent domain used for private economic development. In an era where so many people are narrowly divided on so

many issues, stopping eminent domain abuse unites people. That is a very hopeful and inspiring sign. We urge the Michigan House to listen to the voices of their constituents who want to protect home and small business owners in this state.

Thank you very much for the opportunity to present these recommendations regarding changes to Michigan eminent domain law. We stand ready to offer more information and guidance at the request of members of these committees and others.

Prohibiting Eminent Domain for Private Business
Notwithstanding any other provision of law, neither this State nor any political subdivision thereof or any other condemning entity shall use eminent domain to take private property without the consent of the owner to be used for private commercial enterprise, except that property may be transferred or leased

(1) to private entities that are public utilities or common carriers;

(2) to private entities that occupy an incidental area within a publicly-owned project;

(3) to private entities if the property poses a threat to public health and safety and meets the definition of "condemnation-eligible" property.

Condemnation-eligible property shall include:

(1) Any premises which because of physical condition, use or occupancy constitutes a public nuisance or attractive nuisance.

(2) Any dwelling which, because it is dilapidated, unsanitary, unsafe, vermin-infested or lacking in the facilities and equipment required by the housing code of the municipality, is unfit for human habitation.

(3) Any structure which is a fire hazard, or is otherwise dangerous to the safety of persons or property.

(4) Any structure from which the utilities, plumbing, heating, sewerage or other facilities have been disconnected, destroyed, removed, or rendered ineffective so that the property is unfit for its intended use.

(5) Any vacant or unimproved lot or parcel of ground in a predominantly built-up-neighborhood, which by reason of neglect or lack of maintenance has become a place for accumulation of trash and debris, or a haven for rodents or other vermin.

(6) Any property that has tax delinquencies exceeding the value of the property.

(7) Any property with code violations affecting health or safety that has not been substantially rehabilitated within one year of the receipt of notice to rehabilitate from the appropriate code enforcement agency.

(8) Any property which, by reason of environmental contamination, poses a threat to public health or safety in its present condition.

(9) Any abandoned property.

The finding by a public body that a property is a condemnation-eligible shall not create any presumption with regard to the validity of that finding.